Dato' Tan Heng Chew v Tan Kim Hor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–677 OF 2007 AND W-02–708 OF 2007
MOHD GHAZALI, HASAN LAH AND WAN ADNAN MUHAMMAD JJCA
28 JULY 2009

Civil Procedure — Pleadings — Amendment — Statement of claim — Amendment sought after case management with benefit of defendants' submissions — Amendment to show innuendo — Whether amounted to abuse of process of court — Whether amendment would result in addition of new cause of action — Whether amendments would cause injustice to defendant — Whether amendments had effect of resolving true controversy between parties — Whether inordinate delay in applying for amendments — Rules of the High Court 1980 O 20 r 5

The plaintiff filed this action for defamation against the defendants. During the pretrial case management, the defendants raised two preliminary points of law on whether the statements complained of referred to the plaintiff and whether those statements were defamatory in their natural and ordinary meaning. Learned counsel for the plaintiff subsequently applied under O 20 r 5 of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court for leave to amend the writ of summons and the statement on the following grounds: (a) that the amendments would enable the nature and meaning of the defamatory statements complained of by the plaintiff to be stated with greater clarity; (b) that the amendments would enable the real questions in controversy between the parties to be decided; and (c) that the amendments would enable a speedy and more expedient trial. The learned senior assistant registrar granted leave to amend the statement of claim. The learned High Court judge allowed the defendants' appeals against the decision of the senior assistant registrar. The plaintiff appealed against the decision of the learned High Court judge.

Held, allowing the appeals with costs:

(1) There was no application made by the defendants to determine any question of law pursuant to O 33 r 2 or O 14A of the RHC. The judge never made any ruling on what was submitted or raised before him on that day. What transpired on that day was more in the form of prior

discussion during the pretrial case management. As such, an application to amend the pleading once the matter was set down for pretrial case management could not tantamount to an abuse of process. It was clear from the learned judge's order that the plaintiff was asked to provide particulars of extrinsic facts relied upon. The plaintiff could only do this by amending his statement of claim (see paras 34–35).

(2) The original pleadings had in fact pleaded 'inferences' and extrinsic facts to support the claim of innuendo. Under para 2 of the 'agreed issues to be tried', the issue to be tried was whether the statements were defamatory of the plaintiff. That paragraph did not say whether the statements in their natural and ordinary meaning were defamatory. As such, the plaintiff ought to be allowed to amend his statement of claim so that he could include a further plea of further extrinsic facts (see para 39).

(3) There was no impediment under O 20 r 5(5) of the RHC for the plaintiff to amend his pleadings notwithstanding the fact that it would result in the addition of a new cause of action because the case had not been set down for trial. The proposed amendments were based on the same facts and did not depart from the original pleadings. The amendments sought to set out with greater clarity the plaintiff's claim that the statements complained of were defamatory of him by way of innuendo other than in their natural and ordinary meaning (see para 41).

(4) The proposed amendments should be allowed so that the true issues in controversy between the parties could be resolved. Since the plaintiff felt that his original statement of claim would not lead to a decision of the real matter in controversy and the law allows the amendment to be made to the pleadings, the plaintiff should be allowed to have it corrected if it can be made without any injustice to the defendant (see para 43).

(5) In considering whether any injustice would be caused, the position of the plaintiff must be balanced with the interest of the defendant. Injustice caused would be far greater if the plaintiff's case is to be limited prematurely. On the other hand, the defendants would still have their day in court if the proposed amendments are allowed. The plaintiff's application was bona fide. As such, whatever prejudice suffered by the defendants, under the circumstances, could be compensated with costs (see para 46).

(6) There was no inordinate delay on the part of plaintiff in applying for the amendments. Amendments can be made at any stage of the

proceedings. The application for amendment was made at the stage of pretrial case management. It was therefore made at the early stage of the proceedings (see para 47).

[Bahasa Malaysia summary

Plaintif memfailkan tindakan ini terhadap defendan-defendan kerana fitnah. Semasa pengurusan pra-perbicaraan kes defendan-defendan menimbulkan dua perkara awalan mengenai persoalan undang-undang sama ada kenyataan-kenyataan yang diadukan merujuk kepada plaintif dan sama ada kenyataan-kenyataan tersebut adalah fitnah dalam maksud semulajadi dan biasa mereka. Peguam terpelajar untuk plaintif kemudiannya memohon di bawah A 20 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau bidang kuasa mahkamah sedia ada untuk kebenaran bagi meminda writ saman dan penyataan atas alasan-alasan berikut: (a) bahawa pindaan itu akan membolehkan sifat dan makna kenyataan-kenyataan fitnah yang diadukan oleh plaintif dapat dinyatakan dengan lebih jelas; (b) bahawa pindaan itu akan membolehkan persoalan sebenar dalam kontroversi antara pihak-pihak dapat diputuskan; dan (c) bahawa pindaan itu akan membolehkan satu perbicaraan yang cepat dan lebih suaimanfaat. Penolong kanan pendaftar yang terpelajar telah memberikan kebenaran untuk meminda pernyataan tuntutan tersebut. Hakim Mahkamah Tinggi yang terpelajar membenarkan rayuan defendan-defendan terhadap keputusan penolong kanan pendaftar. Plaintif merayu terhadap keputusan hakim Mahkamah Tinggi yang terpelajar itu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tidak ada permohonan dibuat oleh defendan-defendan untuk menentukan apa-apa persoalan undang-undang selaras dengan A 33 k 2 atau A 14A KMT. Hakim tersebut tidak membuat apa-apa keputusan terhadap apa yang dihujahkan atau dibangkitkan di hadapan beliau pada hari itu. Apa yang berlaku pada hari itu adalah lebih dalam bentuk perbincangan semasa pengurusan kes pra-perbicaraan sebelumnya. Oleh itu, satu permohonan untuk meminda pliding setelah perkara itu ditetapkan untuk pengurusan kes pra-perbicaraan tidak boleh disamakan sebagai satu penyalahgunaan proses. Ia jelas daripada perintah hakim yang terpelajar bahawa plaintif telah diminta untuk menyediakan butiran fakta-fakta ekstrinsik yang digunakannya. Plaintif hanya boleh berbuat demikian dengan meminda pernyataan tuntutannya (lihat perenggan 34–35).

(2) Pliding asal itu telah sebenarnya memplidkan 'inferens' dan fakta-fakta ekstrinsik untuk menyokong tuntutan (sindiran innuendo). Di bawah

perenggan 2 daripada 'Isu-isu untuk dibicarakan yang dipersetujui' isu untuk dibicarakan adalah sama ada kenyataan-kenyataan itu adalah memfitnahkan plaintif. Perenggan tersebut tidak menyatakan sama ada kenyataan-kenyataan dalam maksud semulajadi dan biasanya adalah fitnah. Oleh itu plaintif sepatutnya dibenarkan untuk meminda pernyataan tuntutannya supaya dia boleh memasukkan fakta-fakta ekstrinsik yang lanjut (lihat perenggan 39).

(3) Tidak ada halangan di bawah A 20 k 5(5) KMT untuk plaintif meminda plidingnya walaupun ia akan mengakibatkan penambahan satu kausa tindakan baru kerana kes belum ditetapkan untuk perbicaraan. Pindaan-pindaan yang dicadangkan adalah berdasarkan kepada fakta-fakta sama dan tidak menyimpang dari pliding asal. Pindaan-pindaan itu dikemukakan untuk menyatakan dengan lebih jelas tuntutan plaintif bahawa kenyataan-kenyataan yang diadukan adalah untuk memfitnahnya dengan cara sindiran innuendo selain dari maksud semulajadi dan biasanya (lihat perenggan 41).

(4) Pindaan-pindaan yang dicadangkan itu harus dibenarkan supaya isu-isu sebenar dalam kontroversi antara pihak-pihak boleh diselesaikan. Memandangkan plaintif merasakan yang pernyataan tuntutan asalnya tidak akan membawa kepada satu keputusan terhadap perkara sebenar dalam kontroversi dan undang-undang membenarkan pindaan untuk dibuat terhadap pliding maka plaintif harus dibenarkan untuk membetulkannya jika ia dapat dibuat tanpa sebarang ketidakadilan terhadap defendan (lihat perenggan 43).

(5) Dalam menimbangkan sama ada ketidakadilan akan berlaku, kedudukan plaintif mesti diseimbangkan dengan kepentingan defendan. Ketidakadilan yang disebabkan akan jauh lebih besar jika kes plaintif dihadkan secara pramasa. Sebaliknya defendan-defendan akan tetap mendapat peluang mereka di mahkamah jika pindaan-pindaan yang dicadangkan itu dibenarkan. Permohonan plaintif adalah bona fide. Oleh itu, sebarang prejudis yang dialami oleh defendan-defendan, di bawah keadaan-keadaan itu, boleh dipampasi dengan kos (lihat perenggan 46).

(6) Tidak ada kelewatan melampau oleh plaintif dalam memohon untuk pindaan itu. Pindaan boleh dibuat di mana-mana peringkat prosiding. Permohonan untuk pindaan dibuat di peringkat pengurusan kes pra-perbicaraan. Ia oleh itu dibuat di peringkat awal prosiding (lihat perenggan 47).]

Notes

For cases on amendment of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5196–5228.

Cases referred to

Abdul Johari bin Abdul Rahman v Lim How Chong & Ors [1997] 1 MLJ 629, CA (refd)
Grubb v Bristol United Press Ltd [1963] 1 QB 309, CA (refd)
Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189, HL (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Companies Act 1965 s 129(6)
Rules of the High Court 1980 O 14A, O 20 r 5, 5(2), O 33 r 2

Appeal from: Suit No S6–23–76 of 2002 (High Court, Kuala Lumpur)

Lim Kian Leong (Sia Siew Mun with him) (Lim Kian Leong & Co) for the appellant.
Douglas Yee (Siew Choon Jein with him) (Douglas Yee) for the respondent in Civil Appeal No W–02–677 of 2007.
Raja Aziz Addruse (Lee Hishammuddin Allen & Gledhill) for the respondents in Civil Appeal No W–02–708 of 2007.

Hasan Lah JCA (delivering judgment of the court):

INTRODUCTION

[1] The parties are referred to in their respective capacities in the High Court.

[2] By summons in chambers (encl 30), the plaintiff applied under O 20 r 5 of the Rules of the High Court 1980 and/or the inherent jurisdiction of the court for leave to:

(a) substitute the then third defendant with the names of its partners; and

(b) amend the writ of summons and the statement of claim.

[3] The learned senior assistant registrar granted leave to the plaintiff to substitute the then third defendant with the names of its partners and to amend his statement of claim. The first defendant and the second to the 19th defendants filed separate appeals to the judge in chambers against the decision of the learned senior assistant registrar in allowing the amendments to the plaintiff's statement of claim. The learned judge allowed both the appeals with costs on 18 June 2007. The decision to substitute the names of the partners was not challenged before the High Court judge.

A **[4]** The plaintiff filed appeals to this court against the decisions of the learned High Court judge. Case No W-02–677 of 2007 involved the first defendant and Case No W-02–708 of 2007 involved the second to the 19th defendants.

B **[5]** We heard both the appeals on 14 January 2009 and on 15 January 2009, we unanimously allowed both the appeals with costs. We now give the grounds of our decision.

C FACTUAL BACKGROUND

[6] On 29 May 2002, an annual general meeting of APM Automotive Holdings Bhd was held. The meeting was chaired by the plaintiff. One of the resolutions scheduled to be raised at the meeting was the resolution to
D reappoint the first defendant as a director of APM Automotive Holdings Bhd pursuant to s 129(6) of the Companies Act 1965 ('the resolution'). At the meeting, the resolution was put to a vote by a show of hands. The resolution read as follows:

E > Resolved that pursuant to section 129(6) of the Companies Act 1965, Dato' Tan Kim Hor be and is hereby re-appointed as a director of the company and to hold office until the next AGM.

F **[7]** On the show of hands, there were 64 shareholders voting in person or by proxy who were in favour of the resolution and six shareholders/proxies who were against the resolution. The plaintiff, as the chairman of the meeting, declared that on the show of hands, the resolution was carried. Mr Low Kok Meng, a proxy demanded for a poll. The second defendant and Mr Michael Lim, a proxy, both objected to the poll on the grounds that the
G poll was demanded after the declaration by the chairman and that the resolution had been carried on the basis of the wordings of article 61 of the articles of association of the company. They said the declaration by the chairman was conclusive in view of article 61.

H **[8]** The plaintiff ruled that a poll be taken. Later that afternoon, the plaintiff announced that 61% of the votes had been cast not in favour of the resolution. Accordingly, the first defendant was not reelected as a director.

I **[9]** Immediately after the announcement of the results of the poll taken at the AGM on 29 May 2002, the following words were spoken by the second defendant on behalf of the first defendant to the press (these spoken words can be seen at para 11 of the statement of agreed facts in encl 21) and they were said to be defamatory of the plaintiff):

We believe the poll result of APM was a contestable process.

The surviving co-founder of Tan Chong has a good case to remain on the Board of APM.

My client and I are examining all our available options and will be coming up with a decision pretty soon.

Overall, the meetings have been carried out in a proper manner except for the APM resolution.

[10] On 11 October 2002, the plaintiff filed this action against the three defendants ie the first and second defendants and Lee Hishammuddin (sued as a firm) as the third defendant.

[11] For the purpose of the trial, the parties prepared the 'agreed issues to be tried' dated 1 October 2003 as seen in encl 22. There were couched in these words:

(a) whether the statements in para 11 of encl 21 refer to the plaintiff?

(b) if so, whether the statements are defamatory of the plaintiff?

(c) whether the statements bore the meaning that:

> there are reasonable grounds for contending that the holding of a poll on the resolution was not proper and/or was open to legitimate challenge and that as a result the first defendant had failed to secure reelection to the board of APM?

(d) whether the defence of justification is available to the defendants?

(e) whether the statements were fair comment on a matter of public interest?

(f) whether the statements were made falsely and/or maliciously?

(g) what loss and damage, if any, the plaintiff has suffered as a result of the statements?

(h) whether the plaintiff is entitled to aggravated damages, and if so, how much?

(i) whether the first defendant, second defendant and/or the third defendant are liable for the plaintiff's such loss and damage as may be found under paras (g) and (h) above?

[12] During the pretrial case management, the second and the then third defendants raised two preliminary points of law. The questions were whether the statements complained of referred to the plaintiff and whether those statements were defamatory in their natural and ordinary meaning.

[13] On 13 October 2004, learned counsel for the plaintiff requested for a short adjournment because he wanted to introduce further extrinsic evidence to explain the meaning to the statements and to plead innuendoes.

THE AMENDMENTS

[14] The amendments to the writ of summons and the statement of claim proposed by the plaintiff can be seen in Annexure 'A' to encl 30. They involved paras 3, 4, 5, 8, 9, 10, 11, 12 and 13 of the statement of claim and the proposed amendments are as follows:

(3) The 2nd Defendant was at all material times an advocate and solicitor who practised as a partner under the name and style of Lee Hishammuddin is a partner of the 3rd Defendant and is an individual of full age with an address for service at Level 16, Menara Phileo Asia Life, No 189, Jalan Tun Razak, 50400 Kuala Lumpur.

(4) The 3rd — 19th Defendants, at all material times, were partners of the 2nd Defendant and practised under the name and style of Lee Hishammuddin ('the Firm') is a firm of advocates and solicitors which The Firm represented the 1st Defendant in respect of the issue of his re-election as a director of APM Automotive Holdings Bhd, with an address for service at Level 16, Menara Asia Life, No 189, Jalan Tun Razak, 50400 Kuala Lumpur.

(5) On or about 29.5.2002, the 2nd Defendant falsely and/or maliciously made statements on behalf of himself, the 1st Defendant and the 3rd Defendant Firm which bore defamatory imputations against the Plaintiff to the press which consequently led to their publication, inter alia, in 'THE STAR' on 30.5.2002 and 'NEW STRAITS TIMES' on 2.6.2002.

(7) The Offending Statements were made immediately to the press that was awaiting outside the function room after the Annual General Meeting of APM Automotive Holdings Bhd's Annual General Meeting on 29.5.2002. ('the said AGM') which was chaired by the Plaintiff. Press articles prior to the said AGM have already identified the Plaintiff as Chairman of APM Automotive Holdings Bhd. At the said AGM, the 1st Defendant failed to be re-elected as a director.

(8) The 2nd Defendant obviously intended, authorized, anticipated and/or wished that his statements would be published.

(9) By the time the 2nd Defendant made the press statement, there was already much publicity on the 1st Defendant and his family's quest to wind-up Tan Chong Consolidated Sdn Bhd, and their allegations against the Plaintiff and his family being the cause of the 'breakdown of mutual trust'.

(10) Some of the press articles bore inflammatory headings such as:

(1) 'Fireworks expected at AGM — Speculation over position of Tan Chong Motor co-founder'

[The New Straits Times Business on 28.5.2002]

(ii) 'Tan Chong Board tussle on the cards'

[The Star on 23.5.2002]

The press articles also characterized the 'dispute' as between factions led by the 1st Defendant and his nephew, the Plaintiff.

(11) The 2nd Defendant's Offending Statements referred and were understood to refer to the Plaintiff as the Plaintiff was the Chairman of the said AGM.

(12) The natural and ordinary meaning and/or the ordinary inferences of the Offending Statements is in light of the known fact that the Plaintiff was the Chairman of the said AGM is that:

(i) the Plaintiff did not discharge the role as Chairman properly or legitimately;

(ii) the Plaintiff has conducted the re-election process in an improper and illegitimate manner and the improper such conduct resulted in the 1st Defendant's failure to be re-elected.

(13) Further, by way of innuendo the Offending Statements meant and were understood to mean that:

(i) the Plaintiff did not chair the APM resolution to re-elect the 1st Defendant as a Director of the APM Board fairly, properly, legitimately and/or honourably;

(ii) the Plaintiff has resorted to unfair, improper, illegitimate and/or dishonourable means to ensure the removal of the 1st Defendant from the APM Board of Directors;

(iii) the Plaintiff premeditated the ouster of the 1st Defendant from the APM Board of Directors;

(iv) the Plaintiff planned for the removal of the 1st Defendant regardless of the outcome of the APM resolution;

(v) the Plaintiff charaded the APM resolution to disguise his ulterior objective to oust the 1st Defendant from the management of APM.

[15] The grounds for the amendments were stated by the plaintiff as follows:

(a) the amendments would enable the nature and meaning of the defamatory statements complained of by the plaintiff to be stated with greater clarity;

(b) the amendments would enable the real questions in controversy between the parties to be decided; and

(c) the amendments would enable a speedy and more expedient trial.

DECISION OF THE HIGH COURT

[16] The learned High Court judge gave several reasons for dismissing the plaintiff's application. He was of the view that it was the plaintiff's pleaded case that the statements complained of were defamatory in their natural and ordinary meaning. As such, to allow the plaintiff to amend his statement of claim to plead innuendo after learned counsel for the defendants had submitted before Abdul Wahab Patail J on the preliminary points of law would prejudice the defendants and such prejudice could not be compensated by costs.

[17] With regard to the plaintiff's contention that the amendments would enable the nature and meaning of the defamatory statements complained of by the plaintiff to be stated with greater clarity, the learned High Court judge held that the amendments have not made the issues in controversy clearer and the amendments in fact, have raised new facts and issues. According to him, the issues have been defined clearly in the 'agreed issues to be tried'.

[18] With regard to the plaintiff's contention that the amendments would enable a speedy and more expedient trial, the learned High Court judge held that the amendments would delay the proceedings further. There was an inordinate delay of one year and seven months by the plaintiff in making the application for amendments after the agreed issues to be tried' dated 1 October 2003 was filed by the parties.

[19] The learned High Court judge was also of the view that the proposed amendments to the statement of claim was a tactical manoeuvre and an abuse of process of the court. It would also have the effect of nullifying mutual concessions and admissions that the parties have made in the 'statement of agreed facts' and 'agreed issues to be tried'. He was also of the view that the

proposed amendments could be construed as an attempt by the plaintiff to have a second bite at the cherry after hearing submission of the defendants' counsel before Abdul Wahab Patail J.

[20] For the reasons given above, the learned High Court judge held that the proposed amendments ought not to be allowed and he accordingly allowed the defendants' appeals against the decision of the learned senior assistant registrar.

THE APPEAL

[21] The plaintiff had advanced a number of grounds of appeal as could be seen in his memorandum of appeal dated 24 December 2007. However, we would only deal only with the relevant grounds which were focused on the following issues.

[22] Learned counsel for the plaintiff submitted that the learned High Court judge erred when he held that the plaintiff's claim is limited to 'natural and ordinary meaning' and overlooked the fact that the original pleadings have in fact pleaded 'inferences and extrinsic facts' to support the claim of innuendo. According to learned counsel the proposed amendments sought to set out with greater clarity the plaintiff's claim that the statements are defamatory of him by way of the innuendo other than in their natural and ordinary meaning. The proposed amendments included further plea of further extrinsic facts to support the plaintiff's claim that defamatory imputation arises by reason of special knowledge of those extrinsic facts.

[23] As an alternative argument, learned counsel for the plaintiff submitted that even if the proposed amendments would result in the addition of a new cause of action, such amendments are permitted under O 25 r 5(2) of the Rules of the High Court.

[24] It is also submitted by learned counsel for the plaintiff that the learned High Court judge erred when he concluded that the issue agreed among the parties was 'whether the statements were defamatory in their natural and ordinary meaning' when in actual fact, the agreed issue was 'whether those spoken words are defamatory of the plaintiff which is not limited to their natural and ordinary meaning' and included defamatory imputation arising by way of true innuendo.

[25] Learned counsel for the plaintiff further submitted that the High Court judge also erred when he accepted the defendants' submission that the

plaintiff's claim had crystallised and that the plaintiff should not be allowed to 'depart' from what had earlier been agreed upon in the 'statement of agreed issues to be tried'.

[26] The final submission made by learned counsel for the plaintiff was that the learned High Court judge erred when he held that the plaintiff's application was an 'abuse of the process' since this application was made after the defendants have submitted on their application to try preliminary points of law. His contention is that the amendments would not prejudice the defendants' application to try the preliminary points of law.

[27] In response to that learned counsel for the second to the 19th defendants submitted that the plaintiff's case from the outset had been that the statements complained of were defamatory in their natural and ordinary meaning and/or by ordinary inferences in light of known fact. It was on that basis that the statement of agreed facts and the agreed issues were drawn up and the preliminary issues ordered to be tried. The defendants contended that the proposed amendments to para 7 of the statement of claim and the new paras 8 and 9 are irrelevant for determining the meaning of the words uttered whether according to their natural and ordinary meaning or by reference to ordinary inferences to be drawn in light of a known fact.

[28] Learned counsel for the second to the 19th defendants further submitted that the matters pleaded in the new paras 11 and 12 are not true innuendoes and ought not to be allowed to be pleaded. According to him, given that the High Court had already heard the defendants on their submissions on the preliminary issues ordered to be tried, the appellant ought not to be allowed to make amendments and thereby change the complexion of his case.

[29] With regard to the plaintiff's contention that the amendments would define the issues more clearly, the defendants said the issues have been defined clearly enough in the agreed issues and the proposed amendments, in fact, made new allegations and raised more issues.

[30] With regard to the plaintiff's contention that the proposed amendments would expedite the disposal of the issues the defendants submitted that they would in fact delay the proceedings and there was a delay in the plaintiff's application and that amounted to an abuse of process. No explanation was given for the delay.

[31] Learned counsel for the first defendant further submitted that the plaintiff filed the application only after realising that his claim based on the ordinary and natural meaning of the statements in question was in jeopardy.

As such, the application to amend was no bona fide. It was his contention also that the proposed amendments would turn the plaintiffs's suit of one character into another character and they would also introduce a new cause of action in the form of a plea of defamation by way of innuendo.

GOVERNING PRINCIPLES

[32] It is appropriate at this stage to set out briefly the principles governing amendment to the pleadings. Order 20 r 5 of the Rules of the High Court 1980 provides the power to amend the pleadings with leave of the court. In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 at p 214, Mohamed Azmi FJ laid down the following general principle:

> The general principle is that the court will allow such amendments as will cause no injustice to other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another inconsistent character (see *Mallal's Supreme Court Practice* at p 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

[33] In *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] AC 189 at p 212, Lord Brandon of Oakbrook summarised the following four propositions:

> First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendments may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

WHETHER THE PLAINTIFF'S APPLICATION WAS AN ABUSE OF PROCESS

[34] It is to be noted that there was no application made by the defendant

to determine any question of law pursuant to O 33 r 2 or O 14A of the Rules of the High Court 1980. We have gone through the notes of proceedings recorded by Abdul Wahab Patail J during the pretrial case management on 13 October 2004 and were satisfied that the learned judge never made any ruling on what was submitted or raised before him on that day. In fact, at the end of the that proceeding, the learned judge made the following order:

> PERINTAH
>
> (1) (Lim Kian Leng) Plaintiff to provide particulars of extrinsic facts relied upon.
>
> 23 February 2005
>
> tt YA Datuk Abdul Wahab Patail

[35] In our view, what transpired on that day was more in the form of prior discussion during the pretrial case management. As such, an application to amend pleading once the matter was set down for pretrial case management could not tantamount to an abuse of process. Furthermore, it was clear from the learned judge's order that the plaintiff was asked to provide particulars of extrinsic facts relied upon. The plaintiff could only do this by amending his statement of claim.

[36] In *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] AC 189, the House of Lords drew a distinction between amendments that were allowed before a trial begins from one that is allowed at the end of the trial. In his judgment, Lord Griffiths said at p 220:

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do no think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or another. Furthermore, to allow an amendment before the trial begins it quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

[37] Based on the facts of this case, we are unable to agree with the learned High Court judge that the plaintiff's application was an abuse of process. The plaintiff's application was made during the pretrial case management stage and as such, there was no question of abuse of process of court. Such amendment is permitted under O 20 r 5 of the Rules of the High Court

1980.

WHETHER THE PLAINTIFF'S CASE IS LIMITED TO 'NATURAL AND ORDINARY MEANING'

[38] According to the learned High Court judge, the plaintiff's case was that the statements complained of were defamatory in their natural and ordinary meaning. As such, the plaintiff should not be allowed to shift his stand to the detriment and prejudice of the defendants.

[39] With respect, we are in agreement with the contention of the plaintiff's counsel that the original pleadings have in fact pleaded 'inferences' and extrinsic facts to support the claim of innuendo. Under para 2 of the agreed issues to be tried and issue to be tried is whether the statements are defamatory of the plaintiff. That paragraph does not say whether the statements in their natural and ordinary meaning are defamatory. As such, the plaintiff ought to be allowed to amend his statement of claim so that he could include a further plea of further extrinsic facts.

[40] We do not find it necessary to discuss the principle of law on innuendo in detail. Suffice to state that in *Osborn's Concise Law Dictionary*, (10th Ed), it is stated that an innuendo is that part of the statement of claim which connects the alleged libel with its subject, or state the latent meaning of words which are not on the face of them libellous and it must be expressly pleaded. In *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 (CA) at p 326 Holroyd Pearce LJ said:

> In my judgment, the strong body of authority which has been cited leads to the conclusion that any innuendo (that is, any allegation that the words used in a defamatory sense other than their ordinary meaning) cannot rely on a mere interpretation of the words libel itself but must be supported by extrinsic facts or matters. Thus, there is one cause of action for the libel itself, based on whatever imputations or implications can reasonably be derived from the words themselves, and there is another different cause of action, namely, innuendo, based not merely on the libel itself but on an extended meaning created by a conjunction of the words with something outside them. The latter cause of action cannot come into existence unless there is some extrinsic fact to create the extended meaning.

[41] We are further of the view that even if the learned High Court judge was correct in his conclusion that the plaintiff's original pleading was based on the natural and ordinary meaning of the statements complained of, there is no such impediment under O 20 r 5(5) of the Rules of the High Court 1980 for the plaintiff to amend his pleadings notwithstanding the fact that it would result in the addition of a new cause of action because the case has not been set down for trial. The proposed amendments were based on the same

facts and did not depart from the original pleadings. The amendments sought to set out with greater clarity the plaintiff's claim that the statements complained of are defamatory of him by innuendo other than in their natural and ordinary meaning. As stated earlier, it contained a further plea of further extrinsic facts to support the plaintiff's claim that defamatory imputation arises by reason of the special knowledge of those extrinsic facts.

[42] In this connection, we would like to refer to the decision of this court in *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629 that:

> The authorities had strongly indicated that the courts should lean towards granting applications for amendments even when a new cause of action or line of defence was raised provided that it was based on the same facts or arose out of the same transaction subject to an award of costs to the other party for the injustices caused by the amendments. On these considerations, the judge in the court below was right in allowing the appeals as there was no basic departure in the amended pleadings from the original pleadings and thus, the appellant could not be said to be really prejudiced if the amendments were allowed.

[43] It is our view that the proposed amendments should be allowed so that the true lessons in controversy between the parties could be resolved. The court exist for the administration of justice and to decide the rights of the parties and since the plaintiff felt that his original statement of claim would not lead to a decision of the real matter in controversy and the law allows the amendment to be made to the pleadings, the plaintiff should be allowed to have it corrected if it can be made without any injustice to the defendant.

WHETHER IT IS JUST TO ALLOW THE AMENDMENTS

[44] The learned High Court judge held that the plaintiff should not be allowed to shift his stand to the detriment and prejudice of the defendants.

[45] The proposed amendment must necessarily cause some degree of prejudice to the defendants. The learned judge was of the view that the prejudice could not be compensated by costs to the defendants.

[46] We are of the view that in considering whether any injustice would be caused, the position of the plaintiff must be balanced with the interest of the defendant. Injustice caused would be far greater if the plaintiff's case is to be limited prematurely. He would be shut out from his claim of true innuendo based on the further plea of extrinsic facts. On the other hand, the defendants would still have their day in court if the proposed amendments are allowed. The trial proper has not begun. The defendants would still be able to apply

to have the preliminary points of law determined by the court since the proposed amendments are based on the same facts. We had no doubt that the plaintiff's application was bona fide. As such, whatever prejudice suffered by the defendants, under the circumstances, could be compensated with costs.

[47] On the question of delay, with respect, we are unable to agree with the learned High Court judge that there was an inordinate delay on the part of the plaintiff in applying for the amendments. The law is clear that amendments can be made at any stage of the proceedings. In the instant case, the application for amendment was made at the early stage of pretrial case management. It was therefore made at the early stage of the proceedings.

[48] For the reasons aforesaid, we allowed both the appeals with costs here and below. All orders of the High Court judge were set aside and we affirmed the decision of the learned senior assistant registrar in allowing the amendments to the pleadings as per prayer (ii) of the summons in chambers dated 5 May 2005 ie encl 30. We also ordered that the deposits be refunded to the plaintiff.

Appeals allowed with costs.

Reported by Kanesh Sundrum